Chuah Eng Chang @ Chuah Eng Chong v Paya Trubong Estate Sdn Bhd & Anor

HIGH COURT (PULAU PINANG) — SUIT NO PA-22NCvC-96–06 OF 2020
AZIZAN MD ARSHAD JC
5 DECEMBER 2023

Civil Procedure — Amendment — Statement of claim ('SOC') — Whether plaintiff's application to amend SOC was not bona fide but was abuse of process — Whether proposed amendments sought to turn suit from one character into suit of another and inconsistent character — Whether prejudice occasioned to defendants by proposed amendments could not be compensated for by costs — Whether failure to explain delay in filing amendment application could be fatal

In this action, the plaintiff ('P') claimed ownership of certain premises ('Unit 1101-N') on a piece of land ('the land') which the second defendant ('D2') had bought from a third party ('Senitrad'). After the close of pleadings, P managed to obtain a copy of D2's sale and purchase agreement ('SPA') with Senitrad relating to the land and found that P was described in the SPA as being the occupier and owner of Unit 1101-N and that D2 had bought the land on an 'as is where is' basis without vacant possession. Based on these findings, P applied to amend its statement of claim to add new particulars. These included an averment that: (a) D2 had actual knowedge of fraud involving the first defendant, Senitrad and another company ('Continental'); and (b) D2 had actual and/or constructive notice of P's ownership of and rights and interest in Unit 1101-N and that D2 had bought the land subject to those rights and interest of P and of others claiming under P who were in occupation of Unit 1101-N. D2 opposed the amendment application on the grounds that: (i) the SPA was irrelevant to the instant action as P was not a party to it and neither was Senitrad a party to the instant action; (ii) there was unexplained inordinate delay in the filing of the amendment application; (iii) the proposed amendments were not bona fide and prejudiced D2 in a way that could not be compensated by costs; and (iv) the amendments sought to wholly change the character of the suit from the way it was originally pleaded. P argued that the amendments were necessary to bring all matters that were in dispute before the Court for a just decision. As the action had yet to go for trial, P said the proposed amendments would not prejudice the defendants as they would have the right of reply by amending their pleadings accordingly.

Held, dismissing the amendment application:

(1) The court agreed that as P was not a party to the SPA, the amendments to the statement of claim would not be meaningful and would be irrelevant to P's proposal to include the SPA as part of the cause of action against the defendants (see para 59).

(2) The proposed amendments would change the claim and cause of action against the defendants. Under the original pleadings, P only claimed conspiracy between the first defendant, Continental Star Sdn Bhd and Senitrad. There was no allegation against D2 of knowledge of fraud. In the proposed amendments, P claimed that D2 had knowledge of fraud committed by D1, Continental and Senitrad. The cause of action based on conspiracy was completely different from the cause of action based on fraud. This amendment had taken D2 by surprise (see paras 62–64).

(3) The proposed amendments claimed that in the SPA, Senitrad and D2 recognised P as being the occupier and owner of Unit 1101-N. It was also proposed that D2 had actual and/or constructive notice of P's rights and interest in the premises on the land and that D2 had bought the land subject to those rights and interests of P and of the other occupants of the premises. These were all new allegations that caused injustice and prejudice to D2 in a way that could not be compensated for by costs (see paras 64–66).

(4) This court agreed with D2's contention that the proposed amendments were not bona fide and were an abuse of the judicial process. It was clear that the amendment application was not to provide more information for the court to be better able to decide the matter but to correct defects in pleading by adding a cause of action gradually after looking at the defence. The proposed amendments had to be rejected as it was clear that they added new material and facts to the original claim such as to change the character of the original claim (see para 76).

(5) There was no explanation on P's part for its delay in applying to make the proposed amendments. P also did not explain the reason for its delay in obtaining the SPA. Failure to explain the delay in filing the application would result in the application being disallowed. An application would also be disallowed if it was made as a tactical manoeuvre (see paras 78 & 88).

[Bahasa Malaysia summary

Dalam tindakan ini, plaintif ('P') menuntut pemilikan premis tertentu ('Unit 1101-N') di atas sekeping tanah ('tanah tersebut') yang telah dibeli oleh defendan kedua ('D2') daripada pihak ketiga. ('Senitrad'). Selepas pliding ditutup, P berjaya mendapatkan salinan perjanjian jual beli ('SPA') D2 dengan Senitrad berkaitan tanah tersebut dan mendapati P telah dinyatakan dalam SPA sebagai penghuni dan pemilik Unit 1101-N dan bahawa D2 telah membeli tanah itu secara 'seadanya' tanpa pemilikan kosong. Berdasarkan

penemuan ini, P memohon untuk meminda pernyataan tuntutannya untuk menambah butiran baharu. Ini termasuk penegasan bahawa: (a) D2 mempunyai pengetahuan sebenar tentang penipuan yang melibatkan defendan pertama, Senitrad dan syarikat satu lagi ('Continental'); (b) D2 mempunyai pengetahuan sebenar dan/atau konstruktif tentang pemilikan dan hak dan kepentingan P dalam Unit 1101-N dan bahawa D2 telah membeli tanah itu tertakluk kepada hak dan kepentingan P dan orang lain yang menuntut di bawah P yang menduduki Unit 1101-N. D2 menentang permohonan pindaan itu atas alasan bahawa: (i) SPA tidak relevan dengan tindakan semasa kerana P bukan pihak kepadanya dan Senitrad juga bukan pihak dalam tindakan semasa; (ii) terdapat kelewatan yang tidak dapat dijelaskan dalam pemfailan permohonan pindaan; (iii) pindaan yang dicadangkan tidak bona fide dan prejudis D2 dengan cara yang tidak boleh dikompensasikan oleh kos; dan (iv) pindaan yang bertujuan untuk mengubah sepenuhnya watak saman itu daripada cara ia pada asalnya diplidkan. P berhujah bahawa pindaan itu perlu untuk membawa semua perkara yang menjadi pertikaian ke hadapan Mahkamah untuk keputusan yang adil. Memandangkan tindakan itu masih belum dibicarakan, P berkata pindaan yang dicadangkan tidak akan menjejaskan defendan kerana mereka mempunyai hak untuk menjawab dengan meminda pliding mereka sewajarnya.

Diputuskan, menolak permohonan pindaan:

(1) Mahkamah bersetuju bahawa memandangkan P bukan pihak kepada SPA, pindaan kepada Penyata Tuntutan tidak akan bermakna dan tidak relevan dengan cadangan P untuk memasukkan SPA sebagai sebahagian daripada kausa tindakan terhadap defendan (lihat perenggan 59).

(2) Pindaan yang dicadangkan akan mengubah tuntutan dan kausa tindakan terhadap defendan. Di bawah pliding asal, P hanya mendakwa konspirasi antara defendan pertama, Continental Star Sdn Bhd dan Senitrad. Tiada dakwaan terhadap D2 tentang pengetahuan tentang penipuan. Dalam pindaan yang dicadangkan, P mendakwa D2 mempunyai pengetahuan tentang penipuan yang dilakukan oleh D1, Continental dan Senitrad. Kausa tindakan berdasarkan konspirasi adalah berbeza sama sekali daripada punca tindakan berdasarkan penipuan. Pindaan ini telah mengejutkan D2 (lihat perenggan 62–64).

(3) Cadangan pindaan itu mendakwa bahawa dalam SPA, Senitrad dan D2 mengiktiraf P sebagai penghuni dan pemilik Unit 1101-N. Ia juga dicadangkan bahawa D2 mempunyai pengetahuan sebenar dan/atau konstruktif tentang hak dan kepentingan P dalam premis di atas tanah tersebut dan D2 telah membeli tanah tersebut tertakluk kepada hak dan kepentingan P dan penghuni premis yang lain. Ini semua adalah

dakwaan baharu yang menyebabkan ketidakadilan dan prejudis kepada D2 dengan cara yang tidak boleh dikompensasikan dengan kos (lihat perenggan 64–66).

(4) Mahkamah ini bersetuju dengan hujah D2 bahawa pindaan yang dicadangkan adalah tidak bona fide dan merupakan penyalahgunaan proses kehakiman. Ia jelas sekali bahawa permohonan pindaan itu bukan untuk memberikan lebih banyak maklumat kepada Mahkamah agar lebih mampu memutuskan perkara itu tetapi untuk membetulkan kecacatan dalam pliding dengan menambah kausa tindakan secara beransur-ansur selepas melihat pembelaan. Pindaan yang dicadangkan itu terpaksa ditolak kerana jelas ia menambah bahan dan fakta baharu kepada tuntutan asal seperti mengubah sifat tuntutan asal (lihat perenggan 76).

(5) Tiada penjelasan di pihak P untuk kelewatannya memohon untuk membuat pindaan yang dicadangkan. P juga tidak menjelaskan sebab kelewatannya mendapatkan SPA. Kegagalan untuk menjelaskan kelewatan memfailkan permohonan akan menyebabkan permohonan itu tidak dibenarkan. Permohonan juga akan tidak dibenarkan jika ia dibuat sebagai gerakan taktikal (lihat perenggan 78 & 88).]

Cases referred to

Aon Risk Services Australia Ltd v Australian National University (2009) 258 ALR 14, HC (refd)

Asia Pacific Higher Learning Sdn Bhd (registered owner and licensee of the higher learning institution Lincoln University College) v Majlis Perubatan Malaysia & Anor [2020] 2 MLJ 1; [2020] 3 CLJ 153, FC (refd)

Bank Pertanian Malaysia Bhd v Gagnar Corp Sdn Bhd & Ors [2021] 6 MLJ 931; [2021] 8 CLJ 434, CA (refd)

Batcha Ammal v Ponnachi [1965] 2 MLJ 43, FC (refd)

Chaw Anui v Tan Kim Chai [2001] MLJU 531; [2002] 5 CLJ 79, HC (refd)

Christopher ak Bandi @ Josny v Tumbung ak Nakis & Anor (Jamil bin Sindi, third party) [2016] 4 MLJ 100; [2016] 4 CLJ 831, CA (refd)

Dato' Tan Heng Chew v Tan Kim Hor & Ors [2008] 7 MLJ 184, HC (refd)

ECM Libra Investment Bank Bhd v Foo Ai Meng & Ors [2013] 3 MLJ 35; [2013] 1 LNS 99, CA (refd)

Giga Engineering & Construction Sdn Bhd v Yip Chee Seng & Sons Sdn Bhd & Anor [2015] 6 MLJ 449; [2015] 9 CLJ 537, FC (refd)

Hock Hua Bank Berhad v Leong Yew Chin [1987] 1 MLJ 230; [1987] 1 CLJ 126, FC (refd)

Hong Leong Finance Bhd v Low Thiam Hoe and another appeal [2016] 1 MLJ 301; [2015] 8 CLJ 1, FC (refd)

Insofex Sdn Bhd v Labasama Group Sdn Bhd [2000] 7 MLJ 408, HC (refd)

Ismail bin Ibrahim & Ors v Sum Poh Development Sdn Bhd & Anor [1988] 3 MLJ 348, HC (refd)

Kamsen Construction Sdn Bhd v Relevant City Sdn Bhd [2022] MLJU 2991, HC (refd)
Kaplands Sdn Bhd v Lee Chin Cheng Dengkil Oil Palm Plantations Sdn Bhd [2001] 1 MLJ 297; [2000] 4 CLJ 281, HC (refd)
Karuppannan a/l Ramasamy & Anor v Elizabeth Jeevamalar Ponnampalam & Ors (Sundaram a/l Marappa Goundan & Anor, interveners and Raya Realti, third party) and another appeal [2010] 1 MLJ 156, FC (refd)
Kempadang Bersatu Sdn Bhd v Perkayuan OKS No 2 Sdn Bhd [2019] 4 MLJ 614; [2019] 4 CLJ 131, FC (refd)
Klass Corp (M) Sdn Bhd v MKRS Management Sdn Bhd [2016] MLJU 1857; [2016] 4 CLJ 438, HC (refd)
Lim Nyang Tak Michael v Ace Technologies Sdn Bhd [1995] 4 MLJ 616, HC (refd)
Mah Sing Properties Sdn Bhd v SG Prestige Sdn Bhd [2021] 8 MLJ 607, HC (refd)
Meng Holdings Sdn Bhd v Tan Sri Datuk Ibrahim bin Mohamed dan Ambank (M) Berhad (pihak ketiga) [2010] MLJU 1181, HC (refd)
National Feedlot Corp Sdn Bhd & Ors v Public Bank Bhd [2018] MLJU 766, HC (refd)
Palaniappan v Universiti Pertanian Malaysia [1995] 1 MLJ 353, HC (refd)
Raphael Pura v Insas Bhd & Anor [2001] 1 MLJ 49; [2000] 4 CLJ 830, CA (refd)
Ratnam v Cumarasamy & Anor [1965] 1 MLJ 228; [1964] 1 LNS 237, PC (refd)
Smijaya Sdn Bhd dan lain-lain lwn Perwira Affin Bank Bhd [2010] 3 MLJ 54, CA (refd)
Syarikat Tingan Lumber Sdn Bhd v Takang Timber Sdn Bhd [2003] 2 MLJ 495; [2003] 2 CLJ 177, CA (refd)
United Overseas Bank (China) Limited v Siow Kwang Joon @ Siow Kwong Shang [2020] MLJU 1195, HC (refd)
Yamaha Motor Co Ltd v Yamaha Malaysia Sdn Bhd & Ors [1983] 1 MLJ 213; [1983] CLJ Rep 428, FC (refd)
YB Datuk Dr Soon Choon Teck v YB Datuk Robert Lau Hoi Chew & Ors [2009] 3 MLJ 785; [2009] 4 AMR 759, CA (refd)
Yew Wan Leong v Lai Kok Chye [1990] 2 MLJ 152, SC (refd)

Legislation referred to

Courts of Judicature Act 1964 s 3
National Land Code s 340
Rules of Court 2012 O 14A, O 20 r 5, 5(1)

Lawrence Damian Boudville (Ghazi & Lim) for the plaintiff.
Tan Keng Sim (Teow saw & Assoc) for the first defendant.
Lee Kar Kheng (Presgrave & Matthews) for the second defendant.

Azizan Md Arshad JC:

INTRODUCTION

[1] This is the appellant's (plaintiff) application to amend the statement of claim (encl 15). The court after hearing this application has dismissed encl 15 with costs in the cause.

[2] The plaintiff is not satisfied and has appealed to the Court of Appeal against the decision which was delivered on 21 November 2023. The parties are referred to as they were in the High Court.

CAUSE PAPERS

[3] The plaintiff filed the following documents:

(a) *notis permohonan* dated 5 October 2020 ('the said application');

(b) affidavit in support affirmed by Chuah Eng Chang @ Chuah Eng Chong on 5 October 2020; and

(c) plaintiff's affidavit in reply affirmed by Chuah Eng Chang @ Chuah Eng Chong on 13 November 2020.

[4] The first defendant did not oppose the application, but the second defendant opposed it and had filed an affidavit affirmed by Ooi Boon Ewe on 26 October 2020.

COURT'S PROCEEDINGS

[5] The following actions have taken place before the hearing of this encl 15, which is as follows:

(a) prior to this Civil Suit being filed by the plaintiff, the second defendant has filed a Civil Suit No PA-22NCVC-118–04 of 2019 against Yow Hong Soon (Trading as I FULL AUTO CENTRE) for, inter alia, vacant possession for Unit 1101-N, Paya Terubong Road, Mukim 13, Ayer ltam, 11060 Pulau Pinang which was erected on part of the said land;

(b) however, the plaintiff intended to intervene in the civil suit and alleges ownership of the said premises which was erected on the said land on basis of ownership on the said land by virtue of a sale and purchase agreement dated 10 September 1975 and deed of assignment dated 30 November 1992;

(c) on 3 February 2020, the High Court dismissed the plaintiff's application to intervene and subsequently the appeal was withdrawn;

(d) after the High Court dismissed the plaintiff's application to intervene, the plaintiff then filed the civil suit herein on 18 June 2020; and

(e) the plaintiff has also filed a notice of motion dated 11 September 2020 in Court of Appeal to adduce fresh evidence ie the sale and purchase agreement dated 2 October 2014 and it was dismissed by the Court of Appeal on 12 November 2020.

BACKGROUND FACTS

[6] The following are the facts of this case filed by the parties which are relevant to this application:

(a) on 19 June 2020, the plaintiff filed suit against defendants. The writ together with the statement of claim was served on the defendants;

(b) the second defendant entered appearance on 26 June 2020. The first defendant filed their appearance on 8 July 2020;

(c) on the 30 July 2020, the first defendant served on the plaintiff their defence while the second defendant served a defence and counterclaim on 5 August 2020; and

(d) the plaintiff filed a reply to the first defendant's defence and a reply to the second defendant's defence and counterclaim on 8 September 2020.

[7] The plaintiff suspects that the second defendant may have kept a copy of the sales and purchase agreement ('agreement') between the second defendant and Senitrad Sdn Bhd, the previous owner of the property known as Lot 7683, Mukim 13, Daerah Timor Laut, Pulau Pinang held under Geran Hakmilik No 59032 formally known as Holding No 1874, Mukim 12, Daerah Timor Laut, Pulau Pinang held under Geran (First Grade) Registration No 889 ('the said land').

[8] The subject matter of this action is the land. Before filing for discovery, the plaintiff's Solicitor wrote to the second defendant's solicitor, Messrs Presgrave & Matthews on 2 September 2020 for a copy of the said agreement.

[9] According to the solicitor's response on 7 September 2020, the agreement is irrelevant because the plaintiff is requesting evidence (fishing) and they are not required to comply. Ultimately, the plaintiff states that this application was filed after receiving a copy from a 'sympathetic party'.

THE PROPOSED AMENDMENTS

[10] The plaintiff proposed to amend paras 16, 20, 24, 28, 28(b), 28(c), 29, 30 and incorporate new paras 28(c) and (d) of the statement of claim dated 19 June 2020 ('SOC').

[11] For para 28 of the SOC, the plaintiff proposed to amend and insert 'Defendan Kedua mempunyai pengetahuan frod yang telah dilakukan oleh Defendan Pertama, Continental Star Sdn Bhd dan Senitrad Sdn Bhd'.

[12] For para 28(c) of the SOC, the plaintiff proposed to amend and insert 'Selain itu, Defendan Kedua mempunyai notis sebenar (actual notice) dan/atau notis konstruktif (constructive notice) berkenaan dengan kepentingan Plaintif dan ini terbukti dalam perjanjian jual beli Tanah tersebut di antara Senitrad Sdn Bhd dengan Defendan Ke-2 yang bertarikh 02 October 2014 ('Perjanjian Jual Beli Tanah tersebut') yang mengandungi klausa-klausa, inter alia, seperti berikut:

(i) Dalam Jadual 1 Perjanjian Jual Beli Tanah tersebut, Senitrad Sdn Bhd dan Defendan Kedua telah mengiktiraf Plaintif sebagai penghuni dan pemilik tanah untuk premis bernombor 1101-G, Paya Terubong Road, Mukim 13, Ayer Itam, Pulau Pinang.

(ii) Mengikut klausa 2.1 Perjanjian Jual Beli Tanah tersebut, Defendan Kedua telah membeli Tanah tersebut secara 'on an as is where is basis' tanpa milikan kosong.

(iii) Mengikut klausa 6.2.2 Perjanjian Jual Beli Tanah tersebut, dinyatakan sekali lagi bahawa Tanah tersebut dijual tanpa milikan kosong.'

[13] For para 28(d) of the SOC, the plaintiff proposed to amend and insert 'Defendan Kedua membeli tanah tersebut secara 'on an as is where is basis' dan tanpa milikan kosong. Defendan Kedua membeli Tanah tersebut tertakluk kepada hak-hak dan kepentingan-kepentingan yang dipegang oleh Plaintif dan penghuni-penghuni yang memiliki tanah dan premis di Tanah tersebut. Oleh itu, Plaintif telah membeli Tanah tersebut dari Senitrad Sdn Bhd jauh di bawah harga pasaran'.

[14] For para 29 of the SOC, the plaintiff proposed to amend and insert 'Defendan Kedua mempunyai pengetahuan sebenar dan/atau konstruktif bahawa Plaintif adalah pemilik Premis dan Bahagian Tanah tetapi terus membeli Tanah tersebut dengan harga yang amat rendah ...'.

A THE LAW

[15] For amendment to pleadings, the relevant provision is O 20 r 5 of the Rules of Court 2012 ('the ROC') Under this provision. the court may, at any stage in the proceeding, permit the plaintiff to amend the pleadings, or the parties to amend the pleadings, on such terms as to costs or otherwise as may be just and in such a manner, if any, as it may direct.

THE CASES

[16] In *Yamaha Motor Co Ltd v Yamaha Malaysia Sdn Bhd & Ors* [1983] 1 MLJ 213; [1983] CLJ Rep 428 where it was held that the general principle is that the court will allow such amendments as will cause no injustice to the other parties. Three basic questions should be considered to determine whether injustice would or would not result:

(a) whether the application was bona fide;

(b) whether the prejudice caused to the other side can be compensated by costs, and

(c) whether the amendments would not in effect turn the suit from one character into a suit of another and inconsistent character.

[17] In *Hong Leong Finance Bhd v Low Thiam Hoe and another appeal* [2016] 1 MLJ 301; [2015] 8 CLJ 1, it was held as follows:

> [1] *Yamaha Motor* was decided under the Rules of the High Court 1980. However, now under O 34 of the Rules of Court 2012, the progress of the case was no longer left in the hands of the litigants but with the court in the driver's seat. Courts in Malaysia had consistently held that where there was a delay in making an amendment application, the onus was on the applicant to furnish a reasonable explanation for such as delay and this was in effect an additional factor to the *Yamaha Motor*'s rules. In the present case, there had been five case managements since 2011 and there had been no indication at all that an amendment application was contemplated by the defendant. The only explanation given by the defendant in his affidavit for the delay was that he had only discovered that these two new issues were not pleaded when preparing for trial. Such an explanation could not be acceptable.

[18] In *Kaplands Sdn Bhd v Lee Chin Cheng Dengkil Oil Palm Plantations Sdn Bhd* [2001] 1 MLJ 297; [2000] 4 CLJ 281, the High Court held:

> [2] As there had been a long delay, the supporting affidavit must explain the delay unless if the amendment was plain or trivial in nature or was not opposed by the other party, to enable the court to assess and decide whether in the circumstances of the case leave to amend ought to be granted.

[19] In *Klass Corp (M) Sdn Bhd v MKRS Management Sdn Bhd* [2016] MLJU 1857; [2016] 4 CLJ 438, the court held that:

> [2] The defendant had failed to give a reasonable explanation for the delay in making the amendment application. That was fatal and the application would fall flat ...
>
> [3] The defendant's late application for amendment which, if allowed, would cause the trial to be further delayed, was a prejudice to the plaintiff. No longer may a court simply dismiss the delay caused arising out of such a late amendment as merely a prejudice that can always be compensated by costs. Costs alone cannot make prejudice caused more prosaic or palatable. It cannot always atone for or assuage the deleterious delay that has resulted in the prejudice.

[20] In *Palaniappan v Universiti Pertanian Malaysia* [1995] 1 MLJ 353, held:

> (g)The court may at any stage of the proceedings allow any party to amend his pleadings on such terms as may be just (*United Overseas Bank Limited v Heap Huat Rubber Co Sdn Bhd* [1993] 3 CLJ 552).
>
> (h) Order 20 r 5(5) of the RHC allows an amendment to the pleadings where a new cause of action is added or substituted provided that the new cause of action arises from the same facts or substantially from the same facts as the cause of action in respect of which relief has already been claimed.
>
> (i) The court will always act prudently and in determining whether an amendment ought to be allowed, the court will take into consideration two very important factors:
>
> (1) whether the new cause of action arises out of the same facts or substantially the same facts in respect of which relief has already been claimed by the party; and
>
> (2) whether it is just to allow the amendment bearing in mind the bigger picture of whether the amendment will cause any injustice to the other party.

[21] In *Dato' Tan Heng Chew v Tan Kim Hor & Ors* [2008] 7 MLJ 184, held that:

> [6] It is trite law that an amendment, when allowed, takes effect not from the date when the amendment is made but rather from the date of the original writ which it amends and to every successive amendment of whatever nature and at whatever stage the amendment is made. Put differently, when an amendment is made to the writ, that amendment dates back to the date of the original issue of the writ and the action continues as though the amendment had been inserted from the very beginning. In the words of Collins MR in *Sneade v Wotherton* [1904] 1 KB 295, at p 297:
>
> > the writ as amended becomes the origin of the action, and the claim thereon indorsed is substituted for the claim originally indorsed

[7] And, 'once pleadings are amended, what stood before amendment is no longer material before the court and no longer defines the issues to be tried' (per Hodson LJ in *Warner v Sampson* [1959] 1 QB 297, at p 321)'

[22] In *Insofex Sdn Bhd v Labasama Group Sdn Bhd* [2000] 7 MLJ 408, held:

... However, this does not prevent the plaintiff from amending his claim to one of damages for breach of contract before the trial proper (see p 428D-G). The trial had not proceeded and the plaintiffs had filed encl 77 to amend the writ and the statement of claim in order to comply with the decision of the Court of Appeal. Furthermore, the two superior courts did not strike out the civil suit (see p 429H-I)

[23] In *YB Datuk Dr Soon Choon Teck v YB Datuk Robert Lau Hoi Chew & Ors* [2009] 3 MLJ 785; [2009] 4 AMR 759, the court held that:

Zumatex Engineering Sdn Bhd lwn Chung Yoo Hock dan satu lagi [2022] 7 MLJ 636:

Held, allowing the appeal with costs:

(1) Under O 20 r 5 of the Rules of the High Court 1980, a judge has wide discretion to amend pleadings. As a matter of general principle, leave to amend is readily given at any stage of the proceedings, however late, provided that no injustice is caused to the parties. *Yamaha Motor Co Ltd v Yamaha (M) Sdn Bhd & Ors* [1983] 1 MLJ 213 referred. Leave to amend may also be given in a case where the application is made after limitation has set in and the amendment seeks to add a new cause of action, if it arises out of the same facts as a cause of action in respect of which relief has been claimed (*Abdul Johari bin Abdul Rahman v Lim How Chong & Ors* [1997] 1 MLJ 629 referred and; *Hock Hua Bank Bhd v Leong Yew Chin* [1987] 1 MLJ 230 referred (see paras 16-19).

(2) In the instant case, even if the proposed amendment gave rise to a new cause of action, it did not turn the suit from one character into another. The proposed amendment merely sought to supplement what had been pleaded earlier in the statement of claim to show that the words complained of referred to the appellant (see para 21)

...

(4) On the facts, the High Court judge had failed to exercise his discretion judicially. He had also misdirected himself in putting too much weight on the issue of delay and limitation while failing to take into account the general principles applicable in such an application (see para 26).

PLAINTIFF'S SUBMISSIONS

[24] The following are some of the plaintiffs arguments that were raised during the hearing, the second defendant in their affidavit in reply raises a few issues which are without merit and therefore, should not be allowed to deny the plaintiff's application. The plaintiff's submission to the objection are as follows:

(a) the agreement is not relevant:

The second defendant's challenge on this ground does not hold water because the first and foremost, the land transacted in the agreement is the subject matter of this suit. Moreover, the second defendant is a party to the transaction. Furthermore, the plaintiff is named in the agreement as the owner of the premises built on the said land. It is stated in the agreement that the land was sold without vacant possession and on an as is where is basis which directly support the plaintiff claimed that the land was bought below market price. As such the agreement is relevant to this suit and hence the application is made to reflect the nature and contend of the agreement. The second defendant has never refuted the content of the agreement.

(b) delay in making this application:

As the court is aware, pleading was closed after the filing of the reply and defence to counterclaim by the plaintiff on 8 September 2020. This application was made on 5 October 2020 which is less than a month. The plaintiff obtained a copy of the duly signed and stamped copy of the agreement in the middle of September 2020. Therefore, the plaintiff submits that there was no delay and the application was made within reasonable time.

(c) change in the nature of the suit:

The plaintiff respectfully submits that the plaintiff in their reply and defence to counterclaim has pleaded that the second defendant has knowledge of the fraud committed against the plaintiff and as such, this amendment is not somethings new which the second defendant is caught by surprise. Therefore, the plaintiff should be allowed to amend accordingly the statement of claim. Furthermore, the matter has not gone to trial and the second defendant is always at liberty to amend their pleading if needed. It is submitted that the amendment sort herein does not change the facts of the case and in any event, the case *Yamaha Motor Co Ltd v Yamaha Malaysia Sdn Bhd & Ors* [1983] 1 MLJ 213; [1983] CLJ Rep 428 clearly allows the applicant to amend their pleading even if it involve the introduction of a new cause of action.

Before the discovery of the agreement, the plaintiff pleaded in their statement of claim that the second defendant has constructive notice of the plaintiff's interest. However, with the discovery of the agreement, it is the plaintiff's case that the second defendant has actual notice of the plaintiff's interest on the portion of land. Therefore, the plaintiff is bona fide in making this application and in the interest of justice, this application should be allowed by this court.

In *Batcha Ammal v Ponnachi* [1965] 2 MLJ 43 — Thomson LP at p 44, the court held that a plaintiff is entitled to sue on any cause of action she sees fit. Whether or not she is able in the event to make it

out is irrelevant at this stage, and of course if she fails to make it out she must pay the usual penalty in the way of costs. As such, it is submitted that the plaintiff should not be prevented from pursuing his case in any manner he thinks fit to do so.

[25] Based on the submission above, the counsel for the plaintiff respectfully submits that the application made herein was bona fide and will not prejudice the second defendant that cannot be compensated with cost. The second defendant can always amend their defence if they wish to do so. Moreover, the trial dates have not been fixed yet and the first defendant has not objected to this application. In the interest of justice, we pray for order in terms of the plaintiff's application in encl 15.

[26] In *Batcha Ammal v Ponnachi* [1965] 2 MLJ 43 Thomson LP at p 44, the court held that a plaintiff is entitled to sue on any cause of action she sees fit. Whether or not she is able in the event to make it out is irrelevant at this stage, and of course if she fails to make it out she must pay the usual penalty in the way of costs. As such, it is submitted that the plaintiff should not be prevented from pursuing his case in any manner he thinks fit to do so.

[27] Based on the submission above, the counsel for the plaintiff respectfully submits that the application made herein was bona fide and will not prejudice the second defendant that cannot be compensated with cost. The second defendant can always amend their defence if they wish to do so. Moreover, the trial dates have not been fixed yet and the first defendant has not objected to this application. in the interest of justice, we pray for order in terms of the plaintiff's application in encl 15.

THE SECOND DEFENDANT'S SUBMISSIONS

[28] The second defendant submits that the three conditions relating to amendment as laid down in the Federal Court case of *Yamaha Motor Co Ltd v Yamaha Malaysia Sdn Bhd & Ors* has not been fulfilled, namely:

(a) the proposed amendments would in fact turn the suit from one character into another and inconsistent character;

(b) the proposed amendments are not bona fide, unjust, delay and prejudicial to second defendant; and

(c) the prejudice caused to the plaintiff cannot be compensated by costs

The agreement is not relevant

[29] The plaintiff is not a privy and/or party to the sale and purchase agreement dated 2 October 2014 between Senitrad Sdn Bhd and the second

defendant. Furthermore, Senitrad Sdn Bhd is also not a party in the civil suit herein. Therefore, the plaintiffs proposed amendment should not be allowed based on the sale and purchase agreement dated 2 October 2014. Moreover, it is an undisputed fact that the second defendant is the registered owner of the said land.

[30] Furthermore, the plaintiff is not allowed to approbate and reprobate 2 October 2014 also states as follows:

> 2.2.1 that the Vendor is the absolute legal and beneficial owner of the Land;
>
> 2.2.2 that save and except for the Occupiers as provided or disclosed to the Purchaser in this agreement there is no charge, caveat, lien or other encumbrances whether legal or equitable, registered, lodged or otherwise affecting the Land or any part thereof;
>
> 2.2.3 that there are no prohibitory orders, charging orders or notice of seizure affecting the Land or any part thereof or any notice which renders dealings in respect of the Land or any part thereof null and void or voidable;
>
> ...
>
> 2.2.9 that there is no previous sale or assignment or agreement for the sale and purchase of the Land or any part thereof or any lease or tenancy which is/are still subsisting and or which has not been validly and lawfully terminated or rescinded and there are no claims or interests in relation to or affecting the Land or any part thereof

Delay in making this application

[31] There was a delay on the part of the plaintiff to make the proposed amendment. The plaintiff has failed to explain the reason for the plaintiff's delay in obtaining the sale and purchase agreement. The related civil suit ie Civil Suit No PA-22NCVC-118–04 of 2019 ('Civil Suit No 118') filed by the second defendant against the Yow Hong Soon for vacant possession was filed as early as April 2019. The plaintiff who has attempted to intervene in the Civil Suit No 118 has raised the same issues and arguments in Civil Suit No 118. However, the plaintiff only applied to make the proposed amendment based on the sale and purchase agreement on 5 October 2020.

[32] Furthermore, the plaintiff has filed a Notice of Motion dated 11 September 2020 in Court of Appeal to adduce fresh evidence which is the sale and purchase agreement dated 2 October 2014 but it was dismissed by the Court of Appeal on 12 November 2020.

[33] The plaintiff contended that the said application will not prejudice the second defendant as the trial dates have yet to be fixed by this court. The second defendant submits that this is not an excuse for the plaintiff to delay in filing the said application.

[34] Therefore, the second defendant submits that the proposed amendments made by the plaintiff is not bona fide, unjust, delay and prejudicial to the second defendant.

[35] The plaintiff has failed to explain the reason for the plaintiff's delay in obtaining the sale and purchase agreement. The plaintiff did not mention the reasons in his proposed amendments. This shows that the amendment made by the plaintiff is not bona fide.

Change in the nature of the suit

[36] The second defendant submits that the amendment proposed by the plaintiff would in fact change the suit herein here from one character to another and an inconsistent character. The plaintiff has proposed to amend and claim that 'the second defendant has knowledge of the fraud committed by the first defendant, Continental Star Sdn Bhd and Senitrad Sdn Bhd' in para 28 of his statement of claim.

[37] Previously, in the original statement of claim, the plaintiff only claimed conspiracy between the first defendant, Continental Star Sdn Bhd and Senitrad Sdn Bhd only and there was no allegation of knowledge of fraud against the second defendant. However, with the proposed amendment, the plaintiff now claimed that the second defendant has knowledge of the fraud committed by the first defendant, Continental Star Sdn Bhd and Senitrad Sdn Bhd.

[38] The plaintiff also proposed to amend and claim that 'Senitrad Sdn Bhd and the second defendant has recognised plaintiff as occupier and owner of premise No 1101-G ...', in para 28(c) of his SOC. Previously, in the original statement of claim there was no such allegation.

[39] Therefore, the amendment proposed by the plaintiff will indeed cause injustice and prejudice the second defendant and the prejudice caused by the plaintiff cannot be compensated with costs.

[40] Furthermore, the plaintiff also intends to amend para 28(c) and (d) and, inter alia, claim that '... the second defendant has actual notice and/or notice constructive notice regarding the interest of the plaintiff ...' and, inter alia, also claimed that the second defendant bought held by the plaintiff and other occupants.

[41] Previously, in the original SOC, the plaintiff only claimed that the second defendant has constructive notice. However, now the plaintiff has claimed that the second defendant has 'actual notice and/or constructive notice'. In addition, the plaintiff now also claims that the second defendant bought the land subject to the rights and interests held by the plaintiff and other occupants.

[42] Before the second defendant bought the property, the second defendant had conducted a land search on the said land. The search has shown that the said land does not have any restrictions and/or does not have any registered interest on the title of document. Therefore, the s 340 of the National Land Code.

[43] In *Smijaya Sdn Bhd dan lain-lain lwn Perwira Affin Bank Bhd* [2010] 3 MLJ 54, where the Court of Appeal held:

> (2) The proposed amendment was obvious compared to the original defence. It was obvious that the proposed amendment had changed pattern ... The proposed amendment was not minor but a major one to the extent of causing extensive prejudice to the plaintiff. The proposed amendment was also not bona fide.

[44] Based on the above reasons, the second defendant submits that the proposed amendments made by the plaintiff will clearly change the suit herein from one character to another and an inconsistent character. It is obvious that the proposed amendment had changed pattern. The amendment was with regards to the second defendant's alleged knowledge in the fraud by the first defendant whilst in the original claim only involved alleged conspiracy against the second defendant. Furthermore, the proposed amendment also alleged actual notice by the second defendant whilst in the original claim only involved constructive notice against the second defendant.

[45] It is submitted that the second defendant would be prejudiced if the proposed amendment is allowed and such prejudice cannot be compensated by costs as if the plaintiff is allowed to amend his statement of claim and the second defendant definitely cannot be compensated by cost in this regard.

[46] Based on the foregoing, the second defendant submits that the plaintiff has failed to satisfy this honourable court that the proposed amendments follow the principles laid down by the Federal Court in *Yamaha Motor Co Ltd v Yamaha Malaysia Sdn Bhd & Ors* so as to enable this court to grant leave to the plaintiff to amend the statement of claim. In the premises, the second defendant prays that the said application be dismissed with costs.

A OBSERVATIONS ON LEGAL PRINCIPLES

[47] The judge has the discretion to allow an application to amend a pleading, but such powers must be exercised judicially. Under the law, leave to amend can be granted if the court believes it is just and does not cause injustice to the other party in order for the parties to have their day in court over the actual issues in their conflict. According to the ROC of 2012, O 20 r 5, it provides:

B

> Amendment of writ or pleading with leave (O 20 r 5)
>
> C 5 (1) Subject to Order 15, rules 6, 6A, 7, and 8, and the following provisions of this rule, the Court may at any stage of the proceedings allow the plaintiff to amend his writ or any party to amend his pleading, on such terms as to costs or otherwise as may be just and in such a manner, if any, as it may direct.
>
> D (2) Where an application to the Court for leave to make the amendment mentioned in paragraphs (3), (4), or (5) is made after any relevant period of limitation current at the date of the issue of the writ has expired, the Court may nevertheless grant such leave in the circumstances mentioned in that paragraph if it thinks it just to do so ...
>
> E (5) An amendment may be allowed under paragraph (2), notwithstanding that the effect of the amendment will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in action by the party applying for leave to make the amendment.

F

[48] In *Giga Engineering & Construction Sdn Bhd v Yip Chee Seng & Sons Sdn Bhd & Anor* [2015] 6 MLJ 449; [2015] 9 CLJ 537, Richard Malanjum CJ (Sabah and Sarawak) held that:

> [42] Now, it is trite law that the plaintiff is bound by its own pleadings (see *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145; [1997] 1 CLJ 147 *Anjalai Ammal & Anor v Abdul Kareem* [1969] 1 MLJ 22; [1968] 1 LNS 8 *Gimstern Corporation (M) Sdn Bhd & Anor v Global Insurance Co Sdn Bhd* [1987] 1 MLJ 302; [1987] 1 CLJ 123; [1987] CLJ Rep 102 (SC) *Joo Chin Kia v Loh Seng Tek* [1987] 1 CLJ 194; [1987] CLJ Rep 662 and *KEP Mohamed Ali v KEP Mohamed Ismail* [1981] 2 MLJ 10; [1980] 1 LNS 169 (FC)). The plaintiff is not permitted to improve its pleading in any other manner other than by way of an application to amend. Otherwise it would be unfair and prejudicial to the defendants if the plaintiff could now be allowed to raise an issue that was not within the contemplation of the parties in the first place (see *Esso Petroleum Co Ltd v South Port Corpn* [1956] AC 218 *Playing Cards (Malaysia) Sdn Bhd v China Mutual Navigation Co Ltd* [1980] 2 MLJ 182; [1980] 1 LNS 57 (FC)).

G H I

[49] The two leading cases on the applicable principles by the courts in dealing with applications to amend pleadings are *Yamaha Motor Co Ltd v Yamaha Malaysia Sdn Bhd & Ors* [1983] 1 MLJ 213; [1983] CLJ Rep 428,

and *Hong Leong Finance Bhd v Low Thiam Hoe and another appeal* [2016] 1 MLJ 301; [2015] 8 CLJ 1.

[50] In *Chaw Anui v Tan Kim Chai* [2001] MLJU 531; [2002] 5 CLJ 79, the court held that:

> The procedure governing the amendment of a writ or pleadings is contained in O 20 r 5(1) of the Rules of the High Court 1980 which reads:
>
> 5 (1) Subject to Order 15 rules 6, 7 and 8 and the following provisions of this rule, the Court may at any stage of the proceedings allow the plaintiff to amend his writ, or any party to amend his pleading, on such terms as to costs or otherwise as may be just and in such manner (if any) as it may direct.

[51] The aforesaid powers of the court to grant or refuse leave to amend have been authoritatively stated in a good number of cases which set out the governing principles as follows:

(a) whether the effect of the amendment would change the character of a suit to a suit of a different and inconsistent character
(see *Yamaha Motor Co Ltd v Yamaha Malaysia Sdn Bhd & Ors* [1983] 1 MLJ 213; [1983] CLJ Rep 428);

(b) whether the application is bona fide
(see *Yamaha Motor Co Ltd v Yamaha Malaysia Sdn Bhd & Ors* [1983] 1 MLJ 213; [1983] CLJ Rep 428);

(c) whether there is delay
(see *Hong Leong Finance Bhd v Low Thiam Hoe and another appeal* [2016] 1 MLJ 301; [2015] 8 CLJ 1); and

(d) an amendment cannot be used as a tactical manoeuvre
(see *Hong Leong Finance Bhd v Low Thiam Hoe and another appeal* [2016] 1 MLJ 301; [2015] 8 CLJ 1).

[52] The second defendant has objected to the applications by arguing for the above reasons. This court will now evaluate those reasons to determine whether they have been fulfilled by the plaintiff.

THE FACTS PRESENTED BY THE PARTIES

[53] This court reiterates the facts of the case that have been presented by both parties in their oral submissions before the court and also in their written submissions that have been filed.

(See *Kamsen Construction Sdn Bhd v Relevant City Sdn Bhd* [2022] MLJU 2991.)

[54] The plaintiff submits that these proposed additions of sentences are merely to make formal references to statement of claims that have been referred to and also will be referred to at trial. The claims in question are also fully in the knowledge of the defendant. As such these proposed amendments are neither controversial nor drastic and would not come as a surprise to the defendant.

[55] They merely add clarity, ensure completeness, and avoid doubt. For these reasons, the plaintiff submits that the proposed amendments at paragraphs in encl 15 ought to be allowed.

[56] These proposed amendments are entirely fact based and well within the plaintiff's knowledge from the outset, which should have been pleaded at the time of the original pleadings. The ulterior intention is clearly to better its case after the dismissal of encl 14 (application under O 14A of the ROC 2012).

FINDINGS OF THE COURT

The agreement is not relevant

[57] plaintiff's argument that, It is stated in the agreement that the land was sold without vacant possession and on an as is where is basis which directly support the plaintiff claimed that the land was bought below market price. As such the agreement is relevant to this suit and hence the application is made to reflect the nature and contend of the agreement.

[58] Allegation by the second defendant that the plaintiff is not a privy and/or party to the sale and purchase agreement dated 2 October 2014 between Senitrad Sdn Bhd and the second defendant. Furthermore, Senitrad Sdn Bhd is also not a party in the civil suit herein. Therefore, the plaintiff's proposed amendment should not be allowed based on the sale and purchase agreement dated 2 October 2014.

[59] The court agreed that if the plaintiff is not a party to the agreement, the amendment to the agreement will not be meaningful and irrelevant to the plaintiff's proposal to include the agreement as part of the cause of action against the defendant. Therefore, this amendment should be dismissed. In the case of *Meng Holdings Sdn Bhd v Tan Sri Datuk Ibrahim bin Mohamed dan Ambank (M) Berhad (pihak ketiga)* [2010] MLJU 1181, the court held that:

> [26] It is our judgment that the proposed amendments at paragraphs 32(a), 32(b), 32(c) and 33(a), 33(b), 33(c), 33(d) and 33(e) offended the rules of pleadings for the following reasons:
>
> (a) *the proposed amendments fall short of formulating any cause of action;*
>
> (b) *the proposed amendments contained particulars of evidence of motive and*

intent rather than concise statement of fact;

(c) *the proposed amendments brought into the picture the deed of assignment dated 9.2.1993 involving third parties where the respondent was not involved as a party;* and

(d) the proposed amendments contained admissions that were made on behalf of third parties — judgment debtors, and the respondent was in no position to verify the veracity of those admissions and they should therefore reserve for trial where witnesses would be called to determine its relevancy and admissibility.

...

[73] The proposed amendments contravened O 20 r 5 of the RHC in that they are not concise statements of material facts but rather detailed evidence and the prejudice to the respondent cannot be compensated by costs (*Yamaha Motor Co Ltd v Yamaha Malaysia Sdn Bhd & Ors*).

[74] We observed that the respondent challenged the appellants' submissions that the proposed amendments were material facts pleaded to enable the real question in controversy, to wit, issues of fraud and unjust enrichment to be determined. In our judgment, the appellants have infringed the provisions of O 18 r 8 of the RHC in that matters which must be specifically pleaded were not pleaded instead detailed evidence was set out in extenso. (Emphasis added.)

Whether the effect of the amendment would change the character of a suit to a suit of a different and inconsistent character

The plaintiff proposed to amend paras 16, 20, 24, 28, 28(b), 28(c), 29, 30 and incorporate new paras 28(c) and (d) of thr SOC.

The proposed amendments at para 28 of his statement of claim

[60] The plaintiff has proposed to amend and claim that 'the second defendant has knowledge of the fraud committed by the first defendant, Continental Star Sdn Bhd and Senitrad Sdn Bhd'.

[61] The court has looked at the original SOC. In the original statement, it turns out that the claim is completely different from the amendment. By allowing the amendment, the original claim will change where the cause of action against the second defendant will have a different meaning and a new cause of action.

[62] Previously, in the original of SOC, the plaintiff *only claimed conspiracy* between the first defendant, Continental Star Sdn Bhd and Senitrad Sdn Bhd only and there was no allegation of knowledge of fraud against the second defendant. However, with the proposed amendment, the plaintiff now claimed

A that the second defendant has *knowledge of the fraud* committed by the first defendant, Continental Star Sdn Bhd and Senitrad Sdn Bhd.

[63] *The cause of action related to conspiracy is completely different from the cause of action based on fraud*. The elements that need to be proven or defended
B are also different between the two.

[64] The defendant's objection is material because the cause of action will be presented during the trial. The court found this objection is reasonable because
C there was a solid reason why it affected the second defendant's case. This is something new, and this amendment does come as a surprise to the defence of the second defendant.

The proposed amendments at para 28(c) of his statement of claim

D

The plaintiff also proposed to amend and claim that 'Senitrad Sdn Bhd and the second defendant has recognised plaintiff as occupier and owner of premise No 1101-G ...'.

E **[65]** Previously, in the original SOC *there was no such allegation*. Therefore, the amendment proposed by the plaintiff will indeed cause injustice and prejudice the second defendant and the prejudice caused by the plaintiff cannot be compensated with costs.

F

[66] This amendment is *very different from the original claim* of the plaintiff. This is not an explanation to the original claim but a new thing. Nowhere in any of the previous pleadings was it stated in general. This is the first time this has been raised and has deviated from the original claim.

G

The proposed amendments at paras 28(d) and, inter alia, claim

The plaintiff's proposed amendment is that '... the second defendant has actual notice and/or notice constructive notice regarding the interest of the plaintiff
H ...' and, inter alia, also claimed that the second defendant bought the land without vacant possession and subject to the rights and interests held by the plaintiff and other occupants.

[67] Before the second defendant bought the property, the second defendant
I had conducted a land search on the said land. The search has shown that the said land does not have any restrictions and/or does not have any registered interest on the title of document. Therefore, the second defendant has indefeasible ownership rights pursuant to s 340 of the National Land Code.

[68] After looking at the claim statement it is clear that the original SOC, the plaintiff only claimed that the second defendant has constructive notice. *However, now the plaintiff has claimed that the second defendant has actual notice and/or constructive notice.* In addition, the plaintiff now also claims that the second defendant bought the land subject to the rights and interests held by the plaintiff and other occupants.

[69] For para 29 of the SOC, the plaintiff proposed to amend and insert 'The second defendant has real and/or constructive knowledge that the plaintiff is the owner of the Premises and Portion of Land but continues to buy the Land at a very low price ...'.

Of course, the addition to actual notice is a different cause of action than the claim related to constructive knowledge. With a claim based on actual knowledge, the second defendant's defence also might be amended to a new defence.

[70] The use of this words 'constructive knowledge' in the amended pleadings would lead to any misleading and equally would not deny the judicial determination of any real issues in controversy between the parties herein. Therefore, the proposed amendments are very crucial.

[71] Based on the argument, it is clear that the main reason for the objection is that it is 'immaterial.' At this point, the court is going to determine whether the motion has any impact on the second defendant. Therefore, the position taken by the second defendant that at all material times the new paragraphs of the statement of claims, was not in the original statements of claims.

[72] Thus, the plaintiff has deviated from its claim. The court agrees with the second defendant's submission that the amendment would cause a new cause of actions. Hence, there has been changes in the plaintiff's position whatsoever, and the defendant has been prejudiced.

[73] This guide is explained in the case of *Christopher ak Bandi @ Josny v Tumbung ak Nakis & Anor (Jamil bin Sindi, third party)* [2016] 4 MLJ 100; [2016] 4 CLJ 831 (CA): cited with approval *Hong Leong Bank* and held further that parties must be aware that they have a duty to frame their cases fully in all their causes of action and defences before the start of the trial. Conducting one's case by instalment must not be allowed in the context of the present regime of civil procedure. The view of the apex court of Australia by Heydon J in *Aon Risk Services Australia Ltd v Australian National University* (2009) 258 ALR 14, was referred to where it was said that an application to amend a pleading should not be approached on the basis that a party is entitled to raise an arguable claim, subject to payment of costs by way

of compensation. There is no such entitlement. All matters relevant to the exercise of the power to permit amendments should be weighed.

[74] In *Hock Hua Bank Berhad v Leong Yew Chin* [1987] 1 MLJ 230; [1987] 1 CLJ 126, held that:

> It is a guiding principle of cardinal importance on the question of amendment that, generally speaking, all such amendments ought to be made for the purpose of determining the real question in controversy between the parties to any proceedings or of correcting any defect or error in any proceedings.

[75] In *Yew Wan Leong v Lai Kok Chye* [1990] 2 MLJ 152, in the following terms:

> It is not the duty of the court to make out a case for one of the parties when the party concerned does not raise or wish to raise the point. In disposing of a suit or matter involving a disputed question of fact, it is not proper for the court to displace the case made by a party in its pleadings and give effect to an entirely new case which the party had not made out in its own pleadings. The trial of a suit should be confined to the pleas on which the parties are at variance.'

[76] This court agrees with the defendant's counsel that this action is in bad faith (not bona fide) and is an abuse of the judicial process. Based on the argument of the defendant's counsel, *it is clear that the application is not to provide more information for the court, but to correct the pleading defects by adding a cause of action gradually after looking at the Defendant's defence.* These amendments must be rejected as it is clear that they add new material and facts to this claim. This court agrees with the second defendant's argument that there is a change to the nature or character of the original claim, bring harm the pleading and prejudice the second defendant.

[77] In *Karuppannan a/l Ramasamy & Anor v Elizabeth Jeevamalar Ponnampalam & Ors (Sundaram a/l Marappa Goundan & Anor, interveners and Raya Realti, third party) and another appeal* [2010] 1 MLJ 156, the court held that:

> [37] Nevertheless, in our judgment, the learned trial judge was right in not paying heed to this pleading issue, and we do not agree with the Court of Appeal that he had misdirected himself in this respect. The purpose of a pleading is to enable the other party to know the precise case that he has to meet. A defect in a pleading that does not catch the other party by surprise or embarrass or prejudice him ought not to bring harm to the case of the party pleading. In this case, as we have shown, the plaintiff's' failure to plead the option did not embarrass or prejudice the six defendants in any way. From the very outset they knew that it was the second option that was the true basis of the plaintiff's.

Whether there is a delay

[78] This court agrees that there was a delay on the part of the plaintiff to make the proposed amendment. The plaintiff has failed to explain the reason for the plaintiff's delay in obtaining the sale and purchase agreement. The related civil suit ie Civil Suit No PA-22NCVC-118–04 of 2019 ('Civil Suit No 118') filed by the second defendant against the Yow Hong Soon for vacant possession was filed as early as April 2019.

[79] The plaintiff, who tried to intervene in civil action No 118, presented the same questions and arguments in Civil Suit No 118. However, the plaintiff wanted to make the proposed change only on the basis of the sale and purchase agreement dated 5 October 2020.

[80] In addition, the plaintiff submitted a motion to the Court of Appeal on 11 September 2020 to adduce fresh and new evidence, which is the sale and purchase agreement of 2 October 2014, but the Court of Appeal dismissed it on 12 November 2020.

[81] The plaintiff submitted that the said application is without prejudice to the second defendant because trial dates are yet to be fixed by this court. The second defendant claims that this does not excuse the plaintiff's delay in filing the aforementioned application.

Any delay will be assessed based on the case and the explanation in the affidavit. The reasons related to the delay are very important. There must be an explanation, and if there is no explanation, the court will dismiss it.

[82] In *Raphael Pura v Insas Bhd & Anor* [2001] 1 MLJ 49; [2000] 4 CLJ 830, where a delay of three years was considered substantial and inordinate and was the decisive factor for the Court of Appeal in dismissing the amendment application. In that case, the Court of Appeal said as follows:

> In any event a defendant does not take more than three years just to compare and confirm documents;
>
> With respect, this is no excuse for the appellant to delay the application for the amendment of his defence at a very late stage without placing sufficient material before the court and to give cogent reasons thereof.

(See *National Feedlot Corp Sdn Bhd & Ors v Public Bank Bhd* [2018] MLJU 766.)

[83] In *United Overseas Bank (China) Limited v Siow Kwang Joon @ Siow Kwong Shang* [2020] MLJU 1195, held:

I am unable to agree with the defendant in view of the fact that the issue of delay was not reduced to merely calculating the number of months between the date of filing the defence and the amendments. Instead, delay must be looked at in the context of the facts and the other applications filed therein.

[84] In addition, the plaintiff also submits that this application was not filed late because the parties are still in the pre-trial case management stage and the trial dates have not yet been set. But the plaintiff has failed to explain the reason for the plaintiff's delay in obtaining the sale and purchase agreement and amendments

[85] No doubt that the plaintiff may be allowed to amend the pleadings and put forward actual facts to be determined by this court at any stage of the proceeding but the proposed amendments must be made within a reasonable time and without any delay. *An amendment cannot be used as a tactical manoeuvre.*

[86] On this issue, reference is made to the case of *Ismail bin Ibrahim & Ors v Sum Poh Development Sdn Bhd & Anor* [1988] 3 MLJ 348, where it was held that the circumstances in which an amendment would not be permitted are:

(a) where the facts giving rise to the amendment were known at the time of the original pleading; and

(b) where the delay in making the amendment was in connection with some tactical manoeuvre.

[87] In *Mah Sing Properties Sdn Bhd v SG Prestige Sdn Bhd* [2021] 8 MLJ 607, held that:

The delay of the plaintiff is inexplicable and must to my mind be a factor to be given some weight when considering the overall question of whether or not the re re-amendment should be allowed. I find that the consequences of the delay in making the application to amend should rest with the plaintiff's' lawyers because the reasons for the delay are wholly unsatisfactory. In addition, the three-year delay also casts serious doubts on the bona fides of the plaintiff's in only seeking the amendment now because in all probabilities it will cause the hearing of the suit to be further postponed, thus, causing further delay.

[88] In our case, the burden of proof was on the plaintiff to furnish a reasonable explanation to explain the delay in filing an application, and that failure to do so would result in the application being disallowed. An application would also be disallowed if it was made as a tactical manoeuvre. It was established that the Federal Court in *Hong Leong Finance Bhd* had displaced the principles enunciated in *Yamaha Motor Co Ltd v Yamaha Malaysia Sdn Bhd & Ors* on amendment of pleadings, if such application was made at a later stage

of proceedings, it was imperative that the application to amend must be made at an early stage of the proceedings and where the application was made at a later stage there must be cogent and reasonable explanation for the delay.

[89] In *United Overseas Bank (China)* it was held that this tactical manoeuvre, of course, delays the trial of this case. The same concerns were expressed in *Lim Nyang Tak Michael v Ace Technologies Sdn Bhd* [1995] 4 MLJ 616, where in dismissing the defendant's application to amend the defence, the court held that if the defendant truly had a valid defence, it would not have waited, and the fact that it did, raised the inference that the application was a tactical manoeuvre and was done in bad faith to delay the rights of the plaintiff on his claim.

[90] The court found that there was a tactical manoeuvre which would prejudice the right of the second defendant. For all the reasons stated above, the second defendant be said to have been caught off guard and prejudiced by the decision underlying the issues in the proposed amendments.

CONCLUSION

[91] The law as set out in O 20 r 5(1) of the ROC 2012 envisages that leave could still be given for amendments to pleadings, whether they were applied for at any stage of the proceedings, and that the decision whether or not to allow amendments is within the discretion of the trial judge and must be considered accordingly.

[92] It would not be in the interest of justice that the true issue of controversy be disregarded by this court and in the exercise of this discretion to consider this amendment application by the plaintiff, this court must not only consider whether the amendment would cause injustice to the defendant, but also decide whether it is just for this court to do so.

[93] At this stage, the court does not make any means or speculation as to what the parties' next actions will be. This court only decides on this application based on the affidavits and arguments that are before the court, without considering other factors.

[94] In *Bank Pertanian Malaysia Bhd v Gagnar Corp Sdn Bhd & Ors* [2021] 6 MLJ 931; [2021] 8 CLJ 434, the court held that:

> [2] The sealed order clearly showed that the order dated 13 December 2019 was made pursuant to a hearing in chambers made by the respondents under a notice of application. The re-amendment application was an interlocutory application, which was heard and ordered in chambers under O 32 r 11 of the Rules of Court 2012. Be that as it may, the events showed that the respondent's application was

made during the trial and before the completion of trial and therefore, the order of the High Court dated 13 December 2019, was a 'ruling made in the course of a trial.

[3] This court was bound by the principle of stare decisis in the majority decision of the Federal Court in *Asia Pacific Higher Learning Sdn Bhd v Majlis Perubatan Malaysia & Anor* that an appeal does not lie against a decision in an amendment application made in the course of a trial when such a decision does not finally dispose of the rights of the parties. The High Court order dated 13 December 2019 was thus non-appealable. The appeal was incompetent in limine and ought to be struck off. The respondents' preliminary objection was allowed.

[4] The impugned amendments did not create new or additional defence which made it difficult for the appellant to pursue their claim or that they did not result in the appellant being prejudiced. The issue of delay on the part of the respondents in making the application to amend, which was raised by the appellant, ought not to be a factor to dismiss the application to amend. The trial judge had exercised her discretion based on the correct principles of law and there was no miscarriage of justice.

Thus, there was no need or justification for appellate interference by this court.

[95] It is trite law as well that the appellate court will not ordinarily interfere with the exercise of discretion of the trial court in relation to procedural and/or interlocutory matters (see *ECM Libra Investment Bank Bhd v Foo Ai Meng & Ors* [2013] 3 MLJ 35; [2013] 1 LNS 99). In dismissing the appeal with costs, Lord Guest in *Ratnam v Cumarasamy & Anor* [1965] 1 MLJ 228; [1964] 1 LNS 237 amongst others held that:

> The principles upon which a court will act in reviewing the discretion exercised by a lower court are well settled. There is a presumption that the judge has rightly exercised his discretion (*Charles Osenton & Co v Johnston* [1942] AC 130 per Lord Wright at 148). The court will not interfere unless it is clearly satisfied that the discretion has been exercised on a wrong principle and should have been exercised in a contrary way or that there has been a miscarriage of justice (*Evans v Bartlam* [1937] AC 473.

[96] Before this court concludes this judgment, this court brings to the question whether this decision can be appealed. In *Syarikat Tingan Lumber Sdn Bhd v Takang Timber Sdn Bhd* [2003] 2 MLJ 495; [2003] 2 CLJ 177, a 'ruling' made during the course of trial or hearing, which finally dispose the rights of parties does not form part of 'decision' and is therefore non-appealable. The court then clarified by referring to the Courts of Judicature Act 1964 ('the CJA'). Under s 3 of the CJA 1964, the word 'decision' means judgment, sentence, order, but does not include any ruling made in the course of trial or hearing of any cause of matter which does not finally dispose the rights of parties.

[97] The court also wants to emphasise that in the case of *Kempadang Bersatu Sdn Bhd v Perkayuan OKS No 2 Sdn Bhd* [2019] 4 MLJ 614; [2019] 4 CLJ 131,

it is not stated whether the decision must be made before, during or after the trial. This court is of the view that in the course of a trial includes all stages of the trial and what is more important is 'whether it will dispose of the plaintiff's rights in full or the final decision has been made'. If this decision is not included in the principle of the case *Kempadang Satu Sdn Bhd*, then this appeal should be dismissed without hearing the merits of this appeal.

[98] In *Asia Pacific Higher Learning Sdn Bhd (registered owner and licensee of the higher learning institution Lincoln University College) v Majlis Perubatan Malaysia & Anor* [2020] 2 MLJ 1; [2020] 3 CLJ 153, His Lordship Azahar Mohamed CJ (Malaya) in concurring with the majority decision of the Federal Court in *Asia Pacific Higher Learning Sdn Bhd* referred to the Federal Court's decision *Kempadang Bersatu Sdn Bhd*, the court held amongst others that:

> The present position in the law holds that an appeal does not lie against a decision in an amendment application made in the course of a trial and, further, such a decision does not finally dispose of the rights of the parties ...

[99] However, if this court decision can still be appealed because it is not included in the scope of s 3 of the CJA 1964 it is emphasised once again based on the merits of this application, the plaintiff has failed to overcome the obstacle of established legal principles.

PRONOUNCEMENT

[100] Based on the arguments presented to the court and the guiding principles, this court decides that encl 15 to be dismissed with costs in the cause.

Amendment application dismissed.

Reported by Ashok Kumar